IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1937

METRO BROADCASTING COMPANY, INC.,
Appellant,

v.

SECRETARIO DE HACIENDA,
Appellee.

On Appeal from the Supreme Court of the Commonwealth of Puerto Rico

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MOTION TO DISMISS OR TO AFFIRM

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TO THE HONORABLE COURT:

Now comes appellee, the Secretary of the Treasury of the Commonwealth of Puerto Rico, hereinafter named as the appellee, and respectfully moves this Honorable Court to dismiss the appeal in the above entitled case on the grounds that jurisdiction was improperly invoked either before the Supreme Court of Puerto Rico and before this Honorable Court, or to affirm the Partial Judgment of the Superior Court of the Commonwealth of Puerto Rico, San Juan Part, on the grounds that the questions presented by the ap-

peal are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

Appellant herein, a corporation authorized to do business in Puerto Rico, Metro Broadcasting Company, filed suit against the Secretary of the Treasury of the Commonwealth of Puerto Rico, challenging an imposition of a personal property tax upon the radio licenses issued to Metro by the Federal Communications Commission.

Appellant alleged that the imposition of said tax is repugnant to Article VI, Clause 2 of the Constitution of the United States (Supremacy Clause) and therefore invalid.

The San Juan Superior Court, acting upon a previous precedent of the Puerto Rico Supreme Court, decided that the tax was valid and on November 27, 1978 entered judgment against Metro, directing that the tax be assessed.

On March 7, 1979, appellant filed a Petition for a Writ of Certiorari before the Supreme Court of Puerto Rico.

On March 29, 1979 the Supreme Court of Puerto Rico denied the Petition of Certiorari. The present appeal follows.

ARGUMENT

I

JURISDICTION WAS IMPROPERLY INVOKED

The jurisdiction of this Honorable Court was invoked under 28 USC., Section 1258(2). Said statute provides that:

> "Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:
>
> (1) . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity.
>
> (3) . . . .

Appellee herein respectfully submits that this Honorable Court lacks jurisdiction to entertain this case under the above quoted provision or under any other provision. Our contention is based, first of all, on the ground that appellant herein did not comply with the jurisdictional provisions of the Commonwealth of Puerto Rico applicable to this case.

The Partial Judgment of the Superior Court of the Commonwealth of Puerto Rico in this case was rendered on November 27, 1978 and entry of a copy of the notice of said Partial Judgment was made on November 30, 1978.

Since that Partial Judgment was a final judgment as to the questions considered and solved therein on the merits,[1] if appellant thought that said judgment involved a substantial constitutional question, and it wanted that judgment or decree to be reviewed by the Supreme Court of Puerto Rico, it had to comply with the requirements of Section 14(a) of the Judiciary Act of the Commonwealth of Puerto Rico (Title 4 of the Laws of Puerto Rico Annotated, Section 37(a) and with the Rule 53.1(a) of the Rules of Civil Procedure of the Commonwealth of Puerto Rico, (Title 32 of the Laws of Puerto Rico Annotated, App. II, R. 53.1(a)).[2]

[1] A 'final decision' is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination. See *Know National Farm Loan Ass'n* v. *Phillips*, 300 U.S. 194, 197, 198, 57 S.Ct. 418, 81 L. Ed. 599, 108 A.L.R. 738; *Trustees* v. *Greenough*, 105 U.S. 527, 26 L. Ed. 1157; *Gay* v. *Hudson River Electric Power Co.*, 2 Cir., 184 F. 689; *Dant & Pusell* v. *J. D. Halstead Lumber Co.*, 9 Cir., 103 F.2d 306.

As it has been ruled by this Honorable Court:

> "The fact that there were to be further proceedings in the state court did not render the state judgment 'nonfinal or unappealable within the meaning of 28 USC §1257 ... "*North Dakota Pharmacy Bd.* v. *Snyder's Stores* 414 U.S. 156, 38 L Ed 2d 379 (1973)".
>
> Decisions of this Honorable Court constructing Section 1257 of Title 28 of the United States Code are good authorities for the construction of Section 1258 of Title 28 of said Code. *Ocean Park Development Corp.* v. *People of Puerto Rico*, 145 F2d 247 (1944), certiorari denied 323 US 793, 89 L Ed 632.

[2] 4 L.P.R.A. §37(a)

Section 14(a) of the Judiciary Act, supra, provides as follows:

> §37.—Review of rulings of Court of First Instance
>
> (a) Except as provided in clause (d) of this section, final judgments rendered by the Superior Court in civil cases involving or deciding a substantial constitutional question under the Constitution of the United States or the Constitution of Puerto Rico, and final judgments in criminal cases originated in the Superior Court, shall be appealable to the Supreme Court. The filing of notice of appeal shall stay all proceedings in the Superior Court with respect to the judgment or part thereof on appeal, or the questions comprised therein, but the Superior Court may proceed with the suit as to any question involved therein not comprised in the appeal, and if the judgment on appeal provides for the sale of goods liable to loss or deterioration, the Superior Court may order that the same be sold and the proceeds of the sale be deposited therein until the Supreme Court shall enter judgment".[3]
>
> (4 L.P.R.A. 37(a)). Emphasis added.

Rule 53.1(a) of the Rules of Civil Procedure of Puerto Rico provides:

> "An appeal is perfected by filing a notice of appeal with the clerk of the Part of the Court where the case was heard, and a copy thereof shall be filed in the Clerk's Office of the Court of

[3] 32 L.P.R.A., App. II, R. 53.1(a) Clause (d) of Section 37, which is not applicable to this case, refers to the judgments rendered by the Superior Court in appeals coming from the District Court of the Commonwealth of Puerto Rico and in proceedings for review, based on the record of the proceedings had at the administrative level, or by way of trial *de novo*, of the rulings, orders or resolutions of administrative bodies.

> Appeals, *within thirty (30) days after a copy of the notice of judgment is filed in the record of the case.*"
>
> (32 L.P.R.A., App.II, R. 53.1(a), Emphasis added.

As we have already mentioned, the Partial Judgment in this case was rendered on November 27, 1978 and entry of a copy of the notice of said judgment was made on November 30, 1978.

Appellant did not file an appeal within the thirty days after the notice of the judgment was filed in the record of the case. On the contrary, it slept on its case; and it was not until March 7, 1979, after more than three months had elapsed from November 30, 1978, that it filed a Petition for a Writ of Certiorari before the Supreme Court of Puerto Rico. And as it can be appreciated, the jurisdiction of the Supreme Court of Puerto Rico was not invoked under Rule 53.1(a) of the Rules of Civil Procedure of the Commonwealth of Puerto Rico, supra, and Article 14(a) of the Judiciary Act, supra. Rather it was invoked under Article 14(f) of the Judiciary Act (4 L.P.R.A. 37 (f) and Article 671 of the Code of Civil Procedure of Puerto Rico (32 L.P.R.A. 3492)[4]

[4] Section 3492 of 32 L.P.R.A. reads as follows: "The Supreme Court and the Superior Court of Puerto Rico are hereby authorized and empowered to issue writs of certiorari."

Since the certiorari is an extraordinary remedy, it has been ruled by the Supreme Court of Puerto Rico that: Certiorari, as well as other extraordinary remedies, *lies when no appeal or other ordinary remedy exists protecting petitioner's right effectively and rapidly. People* v. *Superior Court*, 81 P.R.R. 740 (1960). Emphasis added. In other words, the certiorari is not a substitute for the remedy of appeal or of review, specially when a party sleeps on its case and lets run the terms for appeal or for review.

Article 14 (f) of the Judiciary Act provides as follows:

> "(f) Any resolution rendered by the Superior Court may be reviewed by the Supreme Court through certiorari to be issued at its discretion and not otherwise." (4 LPRA 37 (f))

As it can be appreciated, since appellant did not appealed on time the Partial Judgment of the Superior Court herein involved, it tried said judgment to be reviewed as a resolution. Said in other words, before the Supreme Court of Puerto Rico it tried the Partial Judgment as a resolution and not as a final judgment. On the other hand, it is trying now from this Honorable Court to review said Partial Judgment as a final judgment. But appellant is precluded from appealing to this Honorable Court the instant case because it did not comply first with the jurisdictional provisions of the Commonwealth of Puerto Rico.

There is another point toward which appellee wants to call the attention of this Honorable Court. At page 2 of its Jurisdictional Statement appellant states:

> "Appellant appeals from the final judgment and order of the Supreme Court of Puerto Rico entered on March 29, 1979, denying appellant's petition for Certiorari and, thus confirming the judgment of the trial court and the validity of the tax."

In the present case the Supreme Court of the Commonwealth of Puerto Rico denied a petition for *Certiorari* filed by appellant. It is necessary to analyse the legal consequences of such a denial in order to determine whether that decision can be considered a final judgment subject to be reviewed by this Honorable Court.

Contrary to appellant's contention, appellee is of the position that the denial of the certiorari has no ultimate legal consequences in the instant case.[5]

In *Maryland* v. *Baltimore Radio Show*,[6] this Honorable Court stated that the sole significance of a *certiorari* denied is that four members of the Court deemed it desirable not to review a decision of the lower court.

> Inasmuch as all that a denial of a petition for a writ of *certiorari* means is that fewer than four members of the Court thought it should be granted, *this Court has vigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. Maryland* v. *Baltimore Radio Show, supra,* at page 919. (Emphasis added).

Also, the decision rendered in *Brown* v. *Allen*,[7] constitutes an ample analysis made by this Honorable Court regarding the legal consequences of a denial of a petition of *certiorari.*

This Court (Frankfurter, J.) in *Brown, supra,* stated the following:

> "The reasons why our denial of *certiorari* in the ordinary run of cases can be any number of things *rather than a decision on the merits* are only multiplied by the circumstances of this class of petitions. And so we conclude that in *habeas corpus* cases, *as in others, denial of certiorari*

[5] "The denial of a writ of *certiorari* has no official precedential value . . ." Barham, Mark E.; "The importance of a Writ Denial", 21 *Loyola Law Review* 835 (1975)

[6] 338 US 912 (1950)

[7] 344 US 443 (1953)

> *cannot be interpreted as an "expression of opinion on the merits".* At page 497 (Emphasis added).

The Supreme Court of the Commonwealth of Puerto Rico has stated its view on this matter on several occasions. The following are only a few examples. In *Heirs of Andrade* v. *Sosa*,[8] the Court stated that the denial of a petition for *certiorari* does not decide any question against any of the parties involved.

Then, in *Bartolomei* v. *Superior Court*,[9] the Supreme Court for the Commonwealth of Puerto Rico stated that:

> As to the scope of the phrase "petition denied" appearing in our aforesaid decision of November 2, *it is enough to say that it simply means that less than three of the seven judges who constitute this court were inclined to issue the writ,* but nowise does it import an expression of the opinion of the Court upon the merits of the case which has been the object of the petition. At page 437 (citations omitted) (Emphasis added)

In *Borinquen Furniture* v. *District Court*,[10] the Supreme Court of Puerto Rico reaffirmed its position in stating that ". . . Furthermore, in denying flatly a petition for certiorari we need not explain the reasons for our denial *nor do we express any view as to the merits of the case*". At page 861 (Emphasis added)

Having been established by the cases and authorities advanced herein that a denial of a petition for certiorari does not constitute, in any manner, neither

[8] 45 PRR 710 (1933)

[9] 77 PRR 436 (1954)

[10] 78 PRR 858 (1956)

an adjudication of the issues presented nor an affirmance of the judgment of the lower court involved, the *certiorari* denied in the present case does not constitute the final judgment referred to in 28 USC §1258,[11] from which review could be obtained before this Honorable Court.

For the aforementioned reasons appellee respectfully submits that the appeal in the present case should be denied for lack of jurisdiction.

Nonetheless, appellee also contends that the question presented for appeal in this case is unsubstantial.

II

QUESTION PRESENTED FOR APPEAL IS UNSUBSTANTIAL

The question presented for appeal by appellant is based on the ground that the imposition of a tax upon the proprietary or possessory interest of appellant in the radio licenses issued to it by the Federal Communication Commission is repugnant to Article VI, Clause 2 of the Constitution of the United States (Supremacy Clause).

The decision in the present case does not retard, impede or burden any federal function, property or law. For that reason such decision is not in conflict with the Federal Supremacy Clause of the Constitution of the United States. What the Federal Communicatons Act provides is that the channels of transmis-

[11] "The jurisdiction of this Honorable Court extends only to final judgments or decrees". *Loeber* v. *Schroeder*, 149 US 580 (1893). See also *Wright* and *Miller*, Federal Practice and Procedure Vol. 10, Section 2651, *et seq.*

sion and the assigned frequencies cannot be the object of private property.[12] But the tax herein involved is one imposed upon the appellant's very valuable possessory interest or proprietary interest represented by the license to operate an specific channel or frequency. As it was ruled by the Supreme Court of Puerto Rico in the case of *W.A.P.A. TV* v. *Secretario de Hacienda*:[13]

> ". . . In a field as practical as taxes, the clearly proprietary interest that is identified with primordial content, value, utility, and benefits which this license represents for the licensee are more important than the academic integration of classical elements in the now renovated concept of property. *Maristany* v. *Sec. of the Treasury*, 94 P.R.R. 276, 284-85 (1967). Form cannot supersede substance. The possessor's interest in the asset (citation ommitted) when he has all the practical attributes of ownership, shall be held a proprietary interest. . . ."
>
> (Appendix to Appellant Petition, pp. 14-15)

In the case of *United States* v. *County of Fresno*, 429 U.S. 452 (1977), cited by the Supreme Court of Puerto Rico in the case of *W.A.P.A. TV* v. *Secretario de Hacienda*,[14] supra, this Honorable Court makes a review of the interpretative evaluation of the Supremacy Clause. In said case this court upheld a property tax imposed by the State of California to federal employees on their possessory interests in housing owned and supplied to them by the Federal Government as part of their compensation. That decision

[12] 47 U.S.C. 301

[13] 105 DPR 816 (1977)

[14] Appendix to Appellant Petition, p. 15.

demonstrates, as well as the decision in the instant case, that each situation or problem has to be examined and solved in light of the applicable law, the circumstances in which that law has to be enforced and the specific facts of the problem. Since both cases involve tax problems, they were solved in a practical and realistic manner.

Concluding the present case does not present a substantial constitutional question. And it has been repeatedly held that the Supreme Court of Puerto Rico should not be reversed in a matter of local law unless the court's determination is "inescapably wrong" or "patently erroneous". *Sancho Bonet* v. *Texas Co., 308 U.S. 463 (1940); De Castro* v. *Board of Commissioners,* 322 U.S. 451 (1944); *C. Brewer P.R.* v. *Corchado,* 303 F.2d 654 (1962); *Acosta-Marrero* v. *Commonwealth of Puerto Rico,* 275 F.2d 294 (1960); *Fullana Corp.* v. *P.R. Planning Board,* 257 F. 2d 355 (1958); *Marquez* v. *Aviles,* 252 F.2d 715 (1958); *Iglesias Acosta* v. *Secretary of Finance of Puerto Rico,* 220 F.2d 651 (1955); *Sagastivelza* v. *P.R. Ins.,* 171 F. 2d 563 (1949); *Compose* v. *Central Cambalache, Inc.,* 1157 F.2d 43 (1946); *Fornaris* v. *Ridge Tool Co.,* 400 U.S. 41, (1970) and *Diaz Gonzalez* v. *Colon Gonzalez,* 536 F.2d 453 (1976).

CONCLUSION

For all the reasons above set forth it is respectfully requested that this appeal be dismissed for lack of jurisdiction, or that the judgment be affirmed on the ground that the question presented by this appeal is so unsubstantial as not to warrant further argument.

At San Juan, Puerto Rico, July 24, 1979

Respectfully submitted.

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